PUBLIC PROSECUTOR v. YOU KONG LAI

[A. Cr. J. (Shankar J.) February 13, 1984]
[Muar – Criminal Appeal No. 21 of 1982]

Criminal Law and Procedure – Charge of corruption – Money alleged to be received as inducement for district officer to renew licence – Whether it is necessary to prove that the district officer was in fact induced to renew licence by reason of payment of gratification – Prima facie case established at end of prosecution case – Definition of "corrupt practice" and "agent" – Unsatisfactory record – Re-trial ordered – Penal Code, ss. 161 & 162 – Prevention of Corruption Act, 1961, s.3

Bribery and Corruption – Charge of corruption – Money alleged to be received as inducement for district officer to renew licence – Whether it is necessary to prove that the district officer was in fact induced to renew licence by reason of payment of gratification – Prevention of Corruption Act, 1961, s.3

Evidence – Record of appeal not up to standards required by the Criminal Procedure Code – Lower court did not consider number of issues of both law and fact – Re-trial ordered.

In this case the facts alleged by the prosecution were that the licence of a night club had been cancelled and the Board of Directors of the Club made every effort to get the licence renewed. Direct approaches by them to the authorities were of no avail. The accused informed one of the directors that he could help in the matter. Accused told the director that the District Officer wanted $30,000/-. After some bargaining the amount was lowered to $25,000/- and the accused was given $15,000/- in cash and a post-dated cheque for $10,000/-. The accused then purported to get in touch with the District Officer and subsequently the licence was renewed. The District Officer who gave evidence for the prosecution said he did not know the directors of the night club and he was not asked whether he knew the accused. There was therefore no evidence to show that the District Officer was in any way involved with the activities of the accused. The District Officer had renewed the licence, as the police authorities, to whom an appeal had been made by the club, had informed him that they had no objections to the renewal of the licence. The post-dated cheque was paid into the accused's bank account. The accused was charged under section 3(a) (ii) of the Prevention of Corruption Act, 1961. At the end of the prosecution case the learned President of the Sessions Court acquitted the accused on the ground that the prosecution had failed to prove that the District Officer had in fact been induced to renew the licence by reason of the corrupt payment. The Public Prosecutor appealed.

Held: (1) upon a proper construction of section 3(a) (ii) of the Prevention of Corruption Act as applied to the facts of this case it was not necessary for the prosecution to prove that the District Officer was in fact induced to renew the licences by reason of the payment of the gratification;

(2) the evidence led by the prosecution in this case went to show not only that the accused solicited the payments in question but also that he actually received the moneys. There was therefore some evidence on each essential element of the offence and the defence should have been called;

(3) the prosecution evidence if unrebutted can only lead to the conclusion that the accused was acting in complicity with somebody in the District Office, not necessarily the District Officer against whom there was no evidence on the record;

(4) in view of the unsatisfactory manner in which the records were kept in this case, a re-trial should be ordered before another President of the Sessions Court.

Cases referred to:

(1) *Mohamed Kassim* v. *Public Prosecutor* [1981] 2 M.L.J. 91.
(2) *Indur Dayaldas* v. *State of Bombay* A.I.R. 1952 Bomb. 58.
(3) *Bhimrao Narasimha Hublikar* v. *Emperor* A.I.R. 1925 Bom 261.
(4) *Chaube Dinkar Rao* A.I.R. 1933 All. 513.
(5) *State of Ajmer* v. *Shivji Lal* A.I.R. 1959 S.C. 847.
(6) *Mahadeo Dannappan Gunaki* v. *State* A.I.R. 1952 Bom. 435, 437.
(7) *Haji Abdul Ghani* v. *Public Prosecutor* [1981] 2 M.L.J. 230, 245.
(8) *Attorney-General* v. *New York Breweries* [1898] 1 Q.B. 205.
(9) *Tengku Abdul Aziz* v. *Public Prosecutor* [1951] M.L.J. 185, 186.

CRIMINAL APPEAL.

Ahmad Haji Maarop (Deputy Public Prosecutor) for the appellant.

C.C. Aiyathurai for the respondent.

Cur. Adv. Vult.

Shankar J.: To the undoubted chagrin of all those who had a vested interest in the Swan Palace Night Club at Batu Pahat, its night-club licence was cancelled on October 18, 1980.

Unrebutted, the effect of the prosecution evidence, was as follows.

Since the cancellation resulted in heavy financial losses for the Club, the Board of Directors of the Club decided to make every effort to get the licence renewed. Yew Tin Son @ Ho Keck Eng (PW3) was then Managing Director. His wife, Helen Chong Poh Chuan (PW2) was also a director. Tee Thor Gee (PW4) was then the manager of the Club. The direct approaches made by them or on their behalf to the authorities were to no avail.

After a lapse of some weeks You Kong Lai @ Er Kong Lai the accused in this case, made his appearance.

He told PW4 that he could help to get the licence renewed.

PW4 in turn told PW3 and gave PW3 the accused's telephone number.

On or about December 25, 1980 PW3 telephoned the accused.

He asked the accused how he could help. He was told by the accused to put down the telephone as the accused had first to contact the District Officer (hereafter referred to as the D.O.) to find out what was required.

A few minutes later the accused telephoned PW3 and told him the D.O. wanted $30,000/-. PW3 asked for a reduction. Once again the accused terminated the conversation saying he had to speak to the D.O. A few minutes later, the accused telephoned PW3 once more and said that the D.O. would settle for $25,000/-.

Some further negotiations on details as to time and place followed and the accused directed the payment to be made on December 27, 1980 at the Sentosa Hotel, Batu Pahat. On that day PW3, his wife PW2 and the Manager Mr. Tee PW4 went to the Sentosa Hotel.

There the accused was given $15,000/- in cash and a post-dated cheque for $10,000/-.

On this occasion also, the accused made a telephone call and held out that he was talking to the D.O.

Thereafter he represented that there would be no further problems in the renewal of the licence.

In sharp contrast to the frustrations and delays which the proprietors of the Night Club had encountered in response to their earlier efforts the events after the payment seemed to work like a charm.

Within a few hours the very same day PW4 received the licence after paying the deposit and the licence fees.

The post-dated cheque for $10,000/- was presented on January 15, 1981 and the evidence showed that the money had found its way into the accused's bank account.

The D.O. (PW6) was himself called to give evidence by the Prosecution. He had issued the letter cancelling the licence in October 1980. On November 26, 1980 the Chief Police Officer Johore had sent a letter to the OCPD at Batu Pahat stating that the police authorities had no objections to the renewal of the licence applied for by the Night Club. It appears that the Club had earlier presented an appeal to the police authorities in this connection.

A copy of this letter was extended to the D.O. at Batu Pahat and specifically marked for the Attention of PW6 by name *i.e.* Tuan Hj. Rahmat bin Asri.

He stated in his evidence that he did not know any of the Directors of the Swan Palace. His decision to renew the licence was made in good faith on the strength of the letter of the CPO.

There was no evidence to show any link between the D.O. and the accused.

He was not even asked whether he knew the accused.

In the result there was no evidence whatsoever on record to show that the D.O. was in any way personally involved with the activities of the accused.

On the other hand, there was also no evidence on record to show why the licence could not have been issued within a few days of the receipt of the CPO's letter or for that matter why the proprietors of the Night Club could not have been officially informed by the D.O. or his official representatives that there was now no objection to the renewals.

On January 17, 1981 a police report was made to the BSN and in due course two charges were levelled against the accused for receiving $15,000/- on December 27, 1980 and $10,000/- on January 15, 1981 in contravention of section 3(a)(ii) of the Prevention of Corruption Act 1961. In these charges the allegation was that the money had been paid by PW2 Helen Chong Poh Chuan.

In the course of the trial it appeared that the actual handing over of the sum of $15,000/- in cash and the post-dated cheque was done by her husband Yew Tin Son @ Ho Keck Eng (PW3). Both the charges were then amended accordingly. At the close of the case for the prosecution the charges were further amended and a single amended charge substituted.

It read as follows:-

"That you on 27.12.1980 at about 12.00 noon at Sentosa Hotel, Batu Pahat, in the District of Batu Pahat, in the State of Johor, did corruptly receive for yourself a gratification of $15,000/- in cash and $10,000/- in cheque No. 185747 drawn on the Development and Commercial Bank Ltd., Batu Pahat from one YEW TIN SON @ HO KOK ENG as inducement to a member of a public body, to wit, the District Officer, Batu Pahat, Johor, doing something in respect of a matter proposed to take place, to wit, for the re-issue of Lesen Hiburan Raya for SWAN PALACE NIGHT CLUB, at No. 1, Jalan Omar, Batu Pahat and that you thereby committed an offence under section 3(a)(ii) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act 57)."

After the necessary legal formalities defence counsel proceeded to make a submission that there was no case to answer.

The core of this submission was that since the evidence had not disclosed any link between the D.O. and the accused it followed that no case had been made out which would warrant a conviction. Defence counsel submitted that it was imperative for the prosecution to show that the accused had in fact induced the D.O. to renew the licence as consideration for the gratification which the accused had received.

It was further submitted that since the accused was not in the employ of the District Office he was not an agent and section 14 of the Prevention of Corruption Act had no application.

It would appear from his grounds of judgment that the Learned President acquitted and discharged the accused without calling for his defence *not* be it noted on the last amended charge but on the first two charges levelled against the accused.

He appears to have completely overlooked the fact that the first 2 charges which name Helen Chong Poh Chuan as the payer were irrelevant to the trial since there was only one charge with which he was concerned at the close of the prosecution case.

The acquittal was based on the sole finding that the prosecution had failed to show that the D.O. had in fact been induced to renew the licence by reason of the corrupt payment.

The material portion of the judgment reads:

"It is the duty of the Prosecution to prove each and every ingredient of the charge in order to establish a *prima facie* case. In the absence of any one ingredient the charge falls.

Therefore in order to cut matters short instead of laying down what the Prosecution has proved I will lay down one main point which the Prosecution did not prove.

Apart from the complainant, the star witness is the District Officer Batu Pahat.

Both the charges say that that the gratification offered by the Accused was "an inducement to a member of a public body, to wit, the District Officer, Batu Pahat, Johore, doing something in respect of a matter proposed to take place, to wit, to arrange for the re-issue of Lesen Hiburan Raya for Swan Palace Night Club."

But PW.6 the District Officer stated "In the absence of the C.P.O., Johore, I would not have given the Licence. I acted in good faith." He did not mention anything about the Accused. The Accused is not implicated. Let alone the fact that the Prosecution did not even call the D.O. to identify the Accused. The licence was cancelled at the request of the O.C.P.D. Batu Pahat because of the "Balai Polis attack by a group of Muslim fanatics."

Therefore the inducement to renew came from the C.P.O., not the Accused.

For the said above reasons, it is my humble considered opinion that the Prosecution has not established a *prima facie* case."

Against this acquittal the Public Prosecutor appealed. Having heard the submissions of the learned DPP and Defence Counsel who appeared in the Court below I ordered that this case be retried before another President.

I said that I would give my reasons for adopting this course of action and I do so now.

I hold that upon a proper construction of section 3(a)(ii) of the Prevention of Corruption Act as applied to the facts of this case it is not necessary for the prosecution to prove that the D.O. was in fact induced to renew the licences by reason of the payment of the gratification.

The key words in section 3 of the Act in the context of the present case are:-

"Any person who shall...

(a) corruptly solicit or receive, ... for himself or for any other person any gratification as an inducement to any member of a public body doing.....anything....in which such public body is concerned shall be guilty of an offence under this act."

The presence of the word "solicit" in the section, to my mind, clearly shows that if a person invites the payment of monies so that he may

allegedly use the same to bribe a member of a public body, he has already committed an offence. The fact that the corrupt purpose was not carried out does not matter. Furthermore the section draws a distinction between a receipt by any person for himself *or for any other person.*

The evidence led by the Prosecution went to show not only that the accused solicited the payments in question but also that he had actually received the monies.

Corroboration was furnished by the evidence that the very post-dated cheque handed to the accused had ended up in his bank account.

PW3 had given clear evidence that in his own mind he had no doubt that he was paying these monies on the strength of the representations made by the accused that unless these payments were made the licence would not be renewed.

Whether the defence should have been called thus depended upon whether there was some evidence (not inherently incredible) which established each essential element in the alleged offence.

That there was such evidence is demonstrated by the answers to the following questions:

1. Did the accused receive any gratification?

   By Section 2 of the Act gratification includes money or an interest in property of any description. Having actually solicited payment from PW3 the Accused had received $15,000/- cash and a post-dated cheque for $10,000/- on December 27, 1980.

2. Was the receipt corrupt?

   Yes, since its avowed purpose was for bribery.

3. Was the gratification received as an inducement to a member of a public body doing anything?

   The accused is said to have represented that the money was required as a bribe for the renewal of the licence by the D.O.

   PW3 believed this representation and paid the money so that it could be used as a bribe. I hold therefore that the gratification was received as an inducement.

4. Was the public body concerned with the doing of that thing?

   There was evidence that the renewal of the licence was the concern of the District Office.

There was therefore some evidence on each essential element of the offence and the defence should have been called.

Although not cited to me in the course of the argument I have since had the opportunity of considering *Mohamed Kassim* v. *Public Prosecutor.*[1] The facts of that case do have some similarity to the one before me. After holding that the defence ought not to have been called because a *prima facie* case had not been established Mohamed Azmi J. (as he then was) observed that there was no evidence that money had been demanded for a corrupt purpose except for the uncorroborated evidence of the complainant who was admittedly an accomplice. Even if the complainant's report had been corroborated it appeared to be more consistent with cheating, by false misrepresentations that the money was intended for the public officers, when in fact it was meant for the accused.

Following upon these observations Mohamed Azmi J. suggested that it was incumbent upon the prosecution to prove that the corrupt money was received as gratification on account of the public officers.

But in that case the charge was that the money was collected on account of the public officers, and there was of course no evidence to that effect.

In the present case the charge is that the gratification was received as an inducement to a public officer.

The difference in my view is significant. When money is collected on account of a public officer it may be appropriate to suggest that the collection was being made with the knowledge and at the direction of such public officer. The evidence of such knowledge and direction may of course be actual direct or circumstantial implied or constructive. But where gratification is solicited and/or received as an inducement does it necessarily follow that the solicitation and/or receipt must be made with the connivance of the public officer in question?

In this context I think it would be helpful for us to consider the situation under sections 161 and 162 of the Penal Code.

I have derived some oblique assistance from the passages appearing at pages 48, 55, 208, 219, 220 and 246 of *Soonavala* on Bribery and Corruption (1964) and also *Gour* on the Indian Penal Code (9th Edition) Vol.II especially at pages 1352-1354.

The following cases appear to merit special attention. In *Indur Dayaldas* v. *State of Bombay*[2] it was held that to constitute an offence under

section 161 it is not necessary that the act for doing which the bribe is given should actually be performed. It is sufficient if a representation is made that the act has been performed or that it will be performed and a public servant who obtains a bribe by making such representation, will be guilty of the offence punishable under this section even if he had or has no intention to perform and has not performed or does not actually perform that act. A representation by a person that he has done or that he will do an act impliedly includes a representation that it was or is within his power to do that act. In other words the act is punishable corruption even if it amounted to cheating by false representations.

Section 161 is of course directed at public servants taking gratification whereas section 3 of the Prevention of Corruption Act is not so limited.

In *Bhimrao Narasimha Hublikar* v. *Emperor* [3] it was held that no favour need be shown to the briber as a fact. It was sufficient if he was led to believe that the matter would go against him if he did not give the bribe.

In *Chaube Dinkar Rao* [4] , the Court was concerned with the effect of sections 107 and 108 of the Penal Code which deal with abetment in conjunction with section 161 of the Penal Code. There 2 accused persons were held liable as abettors of an offence under section 161 with reference to giving a bribe to a Judge. The fact that the judge had no guilty intention or knowledge was held to be immaterial. Explanation 2 to section 108 shows that it is not necessary that the act abetted should be committed and Explanation 3 further states that it is not necessary that the person abetted should have any guilty knowledge or intention.

It is to be noted that under section 2 of the Prevention of Corruption Act an "Offence under this Act includes any conspiracy to commit or attempt to commit or an abetment of any offence under this Act."

At page 246 of *Soonavala* under the commentary to Section 162 of the Penal Code it is stated under the caption "Recipient need not be a public servant: There is no reason why a gratuitous seducer should not be held guilty."

The State of Ajmer v. *Shivji Lal* [5] is very instructive. There a teacher in the service of the government took money to get a job for another person in the railways. No representation had been made that he would approach or influence any particular person and it was held that the offence under section 161 had not been made out. But Wanchoo, J. held at page 850:

> "We are of opinion that if the evidence had disclosed that the accused had indicated that he would influence any public servant in order to secure a job for Prem Singh a presumption as to the motive or reward might have been drawn under section 4(1), assuming again that such a presumption can be drawn where there is a simple passing of money."

In this case the evidence was that the accused represented that he was collecting the money for the D.O, and that PW3 acted under the belief that if he did not make the payment the licence would not be renewed. Whereas section 161 of the Penal Code is confined to public officers, section 3 of the Act is not so limited. In *Mahadeo Dannappan Gunaki* v. *State* [6] at page 437 the Learned Judge stated that:

> "The mens rea consists in his intention to give a bribe in order that it may induce the public servant to do or not to do something which he would otherwise not do or do. This state of mind of the person, who offers a gratification, has obviously nothing to do with the question whether the public servant, to whom the gratification is offered, is or is not in a position to do or not to do the act, for doing or for not doing which the amount is offered to him."

The Prevention of Corruption Act is a much wider statute than the provisions contained in sections 161-165 of the Penal Code. Section 3 of the Act is not limited to public servants but applies to all persons. It applies equally to a person who receives the gratification on behalf of a public officer or for himself.

In this case, through the eyes of PW3 the intention obviously was to give a bribe for the renewal of the licence. Everything else being equal he fell within the four walls of Section 3(b) (ii) of the Act. The *mens rea* was there and the absence of any evidence that the D.O. was *particeps criminis* was irrelevant.

But as for the accused who was charged under Section 3(a) (ii) of the Act, could it seriously be contended that his position was any better because in reality his intention was to cheat and not bribe?

In this context the words of the learned author *Sir Hari Singh Gour* in the Penal Law of India (9th Edition) Vol. II at page 1354 appears to be

peculiarly apt *not* to section 3(a)(ii) of the Act but section 162 of the Code:

"The employment of 'corrupt' means, implies the payment or promise of a bribe. In such a case the public servant would almost invariably be an abettor of this offence. For one is not likely to receive a bribe to share with another unless the latter is privy to it. In any other case, the receiver may be guilty of cheating, but he could scarcely be convicted under this section. Of course, a person may *bona fide* believe that he may be able to induce a public servant by 'corrupt means' without having previously consulted him. His attempt to corrupt him may fail, and still he may be guilty of an offence under this section. In such a case the accused has the option of choosing his own section for his condemnation."

Where the intention or motive of the person who obtains the money is to cheat, a conviction under section 162 of the Code is not available because the section makes it a *sine qua non* that the gratification should be obtained by the recipient as a motive or reward for inducing a public servant to show favour. The section views the transaction through the eyes of the recipient.

In sharp contrast with section 162 of the Code, the words "as a motive or reward for inducing" are plainly missing from section 3 of the Act. PW3 gave the money *"as* an inducement". It must follow on the Prosecution evidence that the money was received *"as* an inducement." The secret intentions of the accused did not alter the nature of this transaction.

The right answer to the question posed above appears to be in the negative.

Admittedly the matter is not one without some difficulty and on the facts of this case may have been better ventilated at the close of the defence when the whole story had come out.

But we are here concerned with whether there was adequate material on the law and on the facts for the learned President to call for the defence and I hold that there was.

In the Court below and before me it was also argued that since the accused was not in the employ of the District Office section 14 of the Act had no application to this case.

In *Haji Abdul Ghani* v. *Public Prosecutor*[7] at 245 Raja Azlan Shah C.J. (Malaya) (as he then was) held that the definition of "corrupt practice" in the Emergency (Essential Powers) Ordinance No. 22 of 1970 is not exhaustive but extensive.

The same approach applies to the definition of the word "agent" in section 2 of the Act. It will be noted that the definition in referring to any person acting for another *includes* a trustee, administrator or executor.

By way of a paralled it is useful to consider the character of an executor *de son tort* (see *Williams & Mortimer* on Executors, Administrators and Probate (1970) at page 40 and *Bowstead* on Agency (12th Edition) page 280, illustrations 3, 4 and 5 and at page 292 illustration 10. Such a person is one who takes upon himself the office of an executor by intrusion and makes himself legally responsible for the monies which he collected: See *Attorney General* v. *New York Breweries Co. Ltd.*[8]

That section 24 of the Act provides that the recovery of secret gifts is to be effected as a civil debt must in my view considerably widen the scope of the definition of "agent" in section 2 of the Act. In a civil case the doctrine of estoppel would preclude the accused from contending that he was not acting as an agent for the District Office in the collection of this money, whatever may have been his secret intentions in the matter. Since the money was paid for a criminal purpose the giver should not be allowed to claim title to it: *ex turpi causa non oritor actio.* Since the accused did not obtain receipt of the money except on the strength of his representation that it was meant for a government officer he cannot be allowed to say that the money is his. The gratification can thus only belong to the principal and the agent must be held to have been acting as agent *pro hac vice.*

It is also to be remembered that under section 2 of the Act a principal includes not only an employer but also a beneficiary under a trust and in the case of a person serving under a public body it includes the public body. To confine himself to a submission that because the accused was not in the employ of the District Office and therefore was not an agent would be putting the matter too narrowly. The fact is that PW3 was corrupted into believing that a public body could be bribed. And he actually produced the money for the bribery pursuant to such belief. Such conduct is the very mischief that the Prevention of Corruption Act is aimed against and persons who solicit and/or receive gratification in the circumstances of this case must suffer the stringent consequences of the Act and not the lesser penalties which might be provided for the offence of cheating under the Code.

Admittedly section 14 of the Act only applies where the accused under sections 3 and 4 of the Act is a person in the employment of a public body and had no application to the accused here. But the prosecution in this case did not have to rely on the presumption. There was direct evidence on the corrupt purpose for which the money was said to be intended.

Thus the fact that there was no evidence to link him with the D.O. himself is not the end of the matter. There was evidence to show that the accused was aware of what was going on in the District Office. There was also evidence that the payment of the gratification appears to have produced miraculous results within a matter of hours. If unrebutted this evidence can only lead to the conclusion that the accused was acting in complicity with somebody in the District Office though not necessarily the D.O. against whom there was no evidence on record. Nothing in this judgement therefore should, on the evidence presently before us, be treated as casting any adverse reflection upon him.

But all said and done, delays in administration in public bodies are the cesspools in which the parasite of corruption breeds. Even if there was no direct link proven between the accused and the D.O. there was some evidence to link the accused with the District Office.

As to why a re-trial before another President is the only proper order in this case, I would make the following further observations.

Section 61 of the Subordinate Courts Act and the case of *Tengku Abdul Aziz* v. *Public Prosecutor*[9] is sufficient authority for the proposition that the Criminal Procedure Code applies equally to Presidents as to Magistrates.

Chapter XXV of the Criminal Procedure Code lays down the mode of taking and recording evidence for Criminal Trials.

A note of the substance of what each witness deposes is to be written down in the President's own hand in legible handwriting and the evidence so taken is to be in the form of a narrative although there is of course a discretion to take down any particular question and answer.

However much the absence of stenographers may be a mitigating factor, the fact remains that if a record of a trial is to serve any useful purpose the notes of evidence which are taken down must be substantial, complete and intelligible.

For reasons which are not clear to me the typewritten record of appeal in this case did not measure up to the standards required by the Criminal Procedure Code. In the course of the argument in the appeal I had invited defence counsel to tell me why the relevant witnesses had not been asked to explain for what purposes the monies had been paid to the accused, if in fact the defence was challenging the prosecution version that it had been paid over as a bribe for the renewal of the licences.

I was informed by the defence counsel that the defence case was that the monies had been paid as a part of race winnings and that PW3 was in fact a book-maker. I was further informed that this defence had in fact been put to PW3 and that he had been cross-examined at some length on the matter.

If this was so the record certainly did not substantiate the statement. Such a line of cross-examination went of course to the very crux of the defence and should have been fully recorded.

These problems were further confounded by the fact that the learned President in his grounds of judgement addressed his mind to the wrong charges. What is more, the effect of confining himself to what he perceived to be just one main point which he thought the prosecution had not proved, he closed his mind to a number of other issues both of law and of fact which appeared to have been canvassed before him and which he was obliged to consider on the merits.

Had he done so he would undoubtedly have got a more balanced view of the whole case.

It is too late now to remit the record back for the Notes of Evidence to be put right and for a reconsideration of the submissions made by both parties at the close of the prosecution case.

In the interest of justice, I repeat, that a re-trial is the only proper order.

In conclusion I would once again reiterate that this judgment is based on the unrebutted evidence led by the prosecution in the Court below. The learned President who is conducting the re-trial must keep in front of his mind, at all times, the

necessity to suspend judgment on the facts until he has heard all the evidence in this case.

The issues raised as to the extent and application of the relevant sections in the Prevention of Corruption Act are of undoubted national importance and it would certainly aid the course of justice for them to be properly ventilated.

Re-trial ordered.

Solicitors: *C.C. Aiyathurai & Co.*

PUBLIC PROSECUTOR v. JAMALI BIN ADNAN

[O. Cr. J. (Shankar J.) March 13, 1984]
[Johore Bahru — Criminal Trial No. 5 of 1982]

Criminal Law and Procedure. – Charge for possession of revolvers and ammunition – Consent of Public Prosecutor – Validity of consent – Whether error in the consent and charge sheet nullifies consent – Whether accused is entitled to an acquittal and discharge as a consequence of the error – Application to amend charges – Application for an order that accused be given a discharge not amounting to an acquittal on the original charges – Internal Security Act, 1960, s. 57 (1) (a) & (b).

In this case, the accused was charged under section 57 (1) (a) and (b) of the Internal Security Act 1960 (the Act) for possessing 2 revolvers and ammunition. The offence was alleged to have been committed on October 19, 1981. On March 3, 1982 the Public Prosecutor issued a written consent to prosecute the accused.

On July 31, 1982, the accused was brought before the Sessions Court at Johor Bahru in Arrest Case No. 49 of 1982. The name of the accused in the charge sheet was written as Jamal bin Adnan K/P 4264630. The charge was read, explained and understood by him. The consent to prosecute the accused was submitted to the Court. The accused was supplied with a copy of the consent and a copy of the charge. No plea was taken from the accused. The accused was then committed to stand trial at the High Court.

On March 10, 1984, the accused was brought before the High Court to stand trial pursuant to the committal order. At the trial the learned Deputy Public Prosecutor submitted the original consent dated March 3, 1982 and also produced two amended charges which differed in some respects from the original two charges.

The main issue in this case was whether the original consent issued by the Public Prosecutor was valid in view of the misdescription of the accused and the discrepancy in that description as between the consent and the committal order. In the original consent the accused was described as Jamali bin Adunan I/C 4829823 whereas in the committal order he was described as Jamali bin Adnan K/P 4264630. There were material differences between the spelling of the name and the Identity Card numbers appearing on the consent and committal order.

The learned D.P.P. drew the attention of the Court to these differences and proposed to proceed with the case because he had evidence that the person named in the consent and the person who was brought before the lower Court was one and the same person.

The defence counsel's submission was that the apparent error in the description of the accused in the consent and the charge sheet nullified the consent and as such the court should acquit and discharge the accused. It was further submitted that the nullity of the consent also avoided the Committal Order and the accused person in the dock in the trial Court was not lawfully there and should therefore be entitled to an acquittal. The defence further submitted that under Regulation 8 once a Committal Order was made the trial had already begun and since the trial was illegal, a discharge amounting to an acquittal must necessarily follow.

Held: (1) the making of a committal order does not mean that the trial of the accused has commenced. The trial proper will begin only when the accused has pleaded. In this case, no trial has commenced as no plea was taken from the accused and the procedure laid down precludes the taking of a plea. Thus it is hard to see how the Court could be asked to make a discharge order amounting to an acquittal before the trial had even commenced;

(2) section 80 of the Internal Security Act does not make it a statutory requirement that the consent of the Public Prosecutor be in writing. Consent can be given orally and if the case is being conducted by the Public Prosecutor himself, consent is implicit;

(3) as to the amended charges, had the learned Deputy Public Prosecutor wished to proceed with the matter, the Court had the jurisdiction to try the case irrespective of the manner in which the accused came before the Court. It derives its original criminal jurisdiction from section 22 of the Court of Judicature Act 1964 and section 79 of the Internal Security Act, not from anything in the Criminal Procedure Code or the Essential (Security Cases) Regulations;

(4) the control of the criminal prosecution is in the hands of the learned Deputy Public Prosecutor and if he chooses not to proceed with the matter for some reasons, the Court will grant his request. The Court therefore ordered that the accused be discharged on the two original charges in the committal order such discharge not amounting to an acquittal.

Cases referred to:-

(1) *R.R. Chari & Anor* v. *The State* A.I.R. 1959 All. 149.
(2) *Lyn Hong Yap* v. *Public Prosecutor* [1956] M.L.J. 226.
(3) *Abdul Hamid* v. *Public Prosecutor* [1956] M.L.J. 231.
(4) *Lim Seo* v. *Reg.* [1962] M.L.J. 304.
(5) *Public Prosecutor* v. *Oie Hee Koi* [1968] 1 M.L.J. 148.